Petition

81-705

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In The

Supreme Court of the United States

October Term 1981

THE STATE BOARD OF EQUALIZATION OF THE STATE OF NORTH DAKOTA and THE HONORABLE ARTHUR A. LINK, as Governor of the State of North Dakota and Chairman of the State Board of Equalization, and THE HONORABLE BYRON L. DORGAN, as Tax Commissioner of the State of North Dakota and Secretary of the State Board of Equalization,

Petitioners,

vs.

RICHARD B. OGILVIE, Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation; SOO LINE RAILROAD COMPANY, a corporation; and BURLINGTON NORTHERN INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether § 306 of 90 Stat. 31, 54, 49 U. S. C. § 11503, a provision of the Railroad Revitalization and Regulatory Reform Act of 1976, vests the district courts of the United States with jurisdiction to declare the personal property and trade fixtures of railroads used in interstate commerce to be exempt from ad valorem property taxation by a State if the State has exempted from such taxation the personal property and trade fixtures owned and used by some, but not all, other businesses.

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are included in the caption of the case in this Court. All defendants in the proceedings below are petitioners in this Court.

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto as Appendix A, together with a letter of August 26, 1981 (Appendix B), from the clerk of that Court correcting the spelling of the word "equalization" throughout the opinion. The opinion of the District Court for the District of North Dakota is reported at 492 F. Supp. 446 (1980).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 20, 1981. This petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

North Dakota Constitution, Article X, Section 4 (formerly Section 179):

> SECTION 4. All taxable property except as hereinafter in this section provided, shall be assessed in the county, city, township, village or district in which it is situated, in the manner prescribed by law. The property, including franchises of all railroads operated in this state, and of all express companies, freight line companies, dining car companies, sleeping car companies, car equipment companies, or private car line companies, telegraph or telephone companies, the property of any person, firm or corporation used for the purpose of furnishing electric light, heat or power, or in distributing the same for public use, and the property of any other corporation, firm or individual now or hereafter operating in this state, and used directly or indirectly in the carrying of persons, property or messages, shall be assessed by the state board of equalization in a manner prescribed by such state board or commission as may be provided by law. But should any railroad allow any portion of its railway to be used for any purpose other than the operation of a railroad thereon, such portion of its railway, while so used shall be assessed in a manner provided for the assessment of other real property.

STATUTORY PROVISIONS INVOLVED

United States Statutes:

90 Stat. 31, 54:

SEC. 306. Part I of the Interstate Commerce Act (49 U. S. C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to

such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district."

"(3) As used in this section the term—

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or

which is owned by the National Railroad Passenger Corporation."

North Dakota Century Code:

Section 57-02-04:

"57-02-04. 'REAL PROPERTY' DEFINED. Real property, for the purpose of taxation, includes:

1. The land itself, whether laid out in town lots or otherwise, and improvements to the land, such as ditching, surfacing, and leveling, except plowing and trees, and all rights and privileges thereto belonging or in anywise appertaining, and all mines, minerals, and quarries in and under the same and shall expressly include all such improvements made by persons to lands held by them under the laws of the United States, all such improvements to land the title to which still is vested in any railroad company and which is not used exclusively for railroad purposes, and improvements to land belonging to any other corporation whose property is not subject to the same mode and rule of taxation as other property.

2. All structures and buildings, including systems for the heating, air conditioning, ventilating, sanitation, lighting, and plumbing of such structures and buildings, and all rights and privileges thereto belonging or in anywise appertaining, but shall not include items which pertain to the use of such structures and buildings, such as machinery or equipment used for trade or manufacture which are not constructed as an integral part of and are not essential for the support of such structures or buildings, and which are removable without materially limiting or restricting the use of such structures or buildings.

3. Machinery and equipment, but not including small tools and office equipment, used or intended for use in any process of refining products from oil

or gas extracted from the earth, but not including such equipment or appurtenances located on leased oil and gas production sites."

57-02-05.1:

"57-02-05.1. 'PERSONAL PROPERTY' DEFINED. Personal property, for the purpose of taxation, shall include all property that is not included within the definition of real property."

Section 57-02-08 (25):

"57-02-08. PROPERTY EXEMPT FROM TAXATION. All property described in this section to the extent herein limited shall be exempt from taxation:

. . .

25. All personal property not required by section 179 of the Constitution of North Dakota to be assessed by the state board of equalization shall become exempt from assessment and taxation in the year 1970 and such property shall not be assessed or taxed for that year or for any year thereafter; provided that this provision shall not apply to any property that is either subjected to a tax which is imposed in lieu of ad valorem taxes or to any particular kind or class of personal property, including mobile homes or house trailers, that is subjected to a tax imposed pursuant to any other provision of law except as specifically provided in this subsection. In addition, this subsection shall not exempt from taxation the personal property of any corporation organized pursuant to the nonprofit laws of any jurisdiction which is not exempt from personal property taxation under any other statute.

. . ."

Section 57-05-01:

"57-05-01. RAILROAD PROPERTY TO BE ASSESSED BY STATE BOARD OF EQUALIZA-

TION. The state board of equalization, at its annual meeting in August in each year, shall assess at its actual value on the first day of January of that year, the operating property, including franchises, of each railroad operated in this state including any electric or other street or interurban railway. If any railroad allows any portion of its railway to be used for any purpose other than the operation of a railroad, the portion of its railway while so used shall be assessed in a manner provided for the assessment of other real property. To enable the board to make a correct valuation of property, it shall have access to all reports, estimates, and surveys of a line of railroad on file in the office of the public service commission and shall have power to summon and compel the attendance of witnesses, and to examine witnesses under oath in any matter relating to the value of the property. In fixing the value of any railroad, and of branch lines and sidetracks, the board shall be governed by the rules prescribed for county and township assessors in valuing other property in this state. The board shall make a record of the value placed by it upon the property of the railroad, including the valuation per mile [1.61 kilometers] of main line and of branch lines and sidetracks. Railroad property held in trust by the public service commission for purposes of reorganization or reopening of the railway line shall be exempt from assessment as provided in this section.

STATEMENT OF THE CASE

In North Dakota all property that is subject to ad valorem taxation is either locally assessed or state assessed for taxation purposes, that is, it is either assessed (valued) by local assessors or by the State Board of Equalization.

In 1969 the North Dakota Legislature enacted Chapter 528 of the Laws of North Dakota—1969, Section 1 of which created Subsection 25 of Section 57-02-08 of the North Dakota Century Code. That subsection exempts personal property, which had been locally assessable, from taxation by the state and its local units of government. That law, however, did not exempt from taxation any property of railroads or other public utilities or of certain nonpublic utility transportation companies whose property was required by Article X, Section 4 (formerly § 179) of the North Dakota Constitution to be assessed by the State Board of Equalization, one of the petitioners herein.

In 1976 under its constitutional authority to regulate interstate commerce, the United States Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 hereinafter the 4-R Act which included, in § 306, provisions prohibiting discriminatory tax treatment of transportation property of railroads by the states. That section became effective on February 5, 1979, three years after approval of the Act by the President, as provided in § 306 (2) (b). The Section was revised and codified as 49 U. S. C. § 11503, but, for reasons stated in footnote 1 of the opinion of the Court of Appeals, reference is made here, as in that opinion, to § 306 of the 4-R Act rather than to 49 U. S. C. § 11503.

In 1979 the North Dakota State Board of Equalization, as required by the North Dakota Constitution, Article X, Section 3, and by § 57-05-01 of the North Dakota Century Code, assessed for ad valorem taxation purposes all of the railroad operating property of the three railroads (hereinafter "Railroads") involved in this proceeding, including the Railroads' personal property and trade

fixtures. The State Board of Equalization in 1979 also assessed for taxation purposes all of the operating property, including personal property and trade fixtures, of other public utility companies (e. g., light, heat, power, telephone, pipe line, and air line companies) and of private car line companies as provided by the same constitutional provision and the applicable statutes.

During that same year of 1979 businesses whose real property was assessed locally (rather than by the State Board of Equalization) for ad valorem taxation purposes were exempt from assessment of their personal property because of the exemption in § 57-02-08 (25) of the North Dakota Century Code that was enacted in 1969. "Real property" and "personal property" for these purposes are defined in §§ 57-02-04 and 57-02-05.1 of the North Dakota Century Code.

As a result of the State Board of Equalization's 1979 assessments of the Railroads' operating properties in North Dakota, the Railroads brought the instant action pursuant to § 306 of the 4-R Act in the United States District Court for the District of North Dakota, claiming that a portion of the 1979 assessments of their properties was invalid. In their complaint the Railroads claimed, among other things, that the portions of their assessments that were attributable to their personal property and trade fixtures were invalid and prohibited by § 306 of the 4-R Act because of the aforesaid state statutory exemption enacted in 1969 (Subsection 25 of § 57-02-08 of the North Dakota Century Code) that exempted from taxation the personal property of businesses whose real property was locally assessed.

The District Court held (492 F. Supp. 446, 453-455) and the Court of Appeals affirmed (last three paragraphs of its opinion) that the State Board of Equalization could not include personal property and trade fixtures in the assessed value of the Railroads' property because under North Dakota law the personal property of locally assessed businesses is exempt from ad valorem taxation and therefore taxation of the Railroads' personal property and trade fixtures violated § 306 (1) (d) of the 4-R Act which prohibits "The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

The basis for jurisdiction in the United States District Court for the District of North Dakota was held to be § 306 (1) (d) of the 4-R Act.

REASONS FOR GRANTING THE WRIT

1. The decision below has great significance to every state that taxes the property of a railroad operating in interstate commerce.

The question presented in this petition is an important question of first impression under a Federal statute that limits the authority of the States to tax the property of railroads used in interstate commerce. It potentially affects the authority of all of the fifty states, except Alaska and Hawaii, to devise state taxing systems that are compatible with § 306 of the 4-R Act enacted by the United States Congress to prohibit discriminatory taxation by

the States of railroad transportation property used in interstate commerce.

An important question of first impression arising under an act of Congress is a recognized basis for the Supreme Court to grant certiorari to review the question. *American Federation of Musicians, et al. v. Wittstein*, 379 U. S. 171, 175 (1964).

Similarly, novel questions as to the interplay of state and federal laws are a basis for the Supreme Court to grant certiorari. *Kossick v. United Trust Co.*, 365 U. S. 731, 733 (1961), rehearing denied 366 U. S. 941 (1961).

The question presented here relates to the jurisdiction of the District Courts as enlarged by § 306 of the 4-R Act enacted by the United States Congress. It is both an important question of first impression under a Federal statute that limits the authority of the States to tax and it is a novel question as to the interplay of State and Federal tax laws. These factors justify the grant of certiorari to review the judgment below.

2. The decision below incorrectly interprets the jurisdictional scope of Section 306 of the 4-R Act.

The portion of the State Board of Equalization's assessments on the Railroads' property that is attributable to the Railroads' personal property and trade fixtures was invalidated by the District Court under § 306(1)(d) of the 4-R Act because of North Dakota's statutory exemption from taxation of the personal property of businesses whose real property is locally assessed. But, as the following shows, that is not a sufficient basis to bring the matter

within the jurisdictional requirements of the district court under § 306 of the 4-R Act.

§ 306(1) enumerates prohibited acts by the States as follows:

> "(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> "(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> "(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> "(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
>
> "(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

As to the prohibited acts enumerated above, § 306(2)(c) provides that "the district courts of the United States

shall have jurisdiction . . . to prevent, restrain, or terminate any acts in violation of this section, except that—

. . .

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;"

The terms "commercial and industrial property" and "transportation property" as used in § 306(2)(c), above, are defined in § 306(3)(c) and (d) as follows:

"3. As used in this section, the term—

. . .

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by the railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

As the above shows, "commercial and industrial property" is limited by the definition in § 306(3)(c) to property "which is subject to a property tax levy", and § 306 (2)(c), in vesting the district courts with jurisdiction, provides that "no relief may be granted under this section unless the ratio of assessed value to true market value,

with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction."

Thus, if the only question before the District Court had been the question of whether or not the Railroads' personal property and trade fixtures were exempt under § 306 because of the State's statutory exemption of the personal property of businesses that are locally assessed for their real estate, it is clear from the provisions of § 306 just quoted that the District Court would not have jurisdiction to grant any kind of relief because no disparity in the assessments of the Railroads' property as compared to exempt personal property of businesses locally assessed for their real property could be shown under § 306(2)(c). No disparity could be shown because exempt personal property does not have an "assessed value" within the purview of § 306(2)(c), nor is it "other commercial and industrial property" within the requirement of that provision because exempt business property is not "subject to a property tax levy" and therefore it cannot be "commercial and industrial property" as defined in § 306(3)(c).

This then invokes the question: Does the District Court acquire jurisdiction to grant that relief under § 306(1)(d) in such a case if it did in fact acquire jurisdiction to grant relief from other acts prohibited by § 306(1)(a), (b), or (c), as is the situation in the instant case?

Petitioners submit that the District Court did not have jurisdiction to grant the relief that it did under § 306(1)(d) whether or not it in fact did have jurisdiction to grant relief from any of the other prohibited acts described in

§ 306(1)(a), (b), or (c). The express language of § 306(2)(c) is too clear to be regarded as ambiguous so as to be subject to the interpretation made by the courts below that the State of North Dakota is prohibited by § 306(1)(d) from assessing and taxing the personal property and trade fixtures of the Railroads because of the exemption of personal property of businesses whose real property is locally assessed.

This Court has just recently again held that when plain and unambiguous language is used by Congress in a statute, there is no need to look to legislative history as a guide to its meaning. *Tennessee Valley Authority v. Hill*, — U. S. —, 98 S. Ct. 2279, 2291, 2296—footnote 29 (1978).

As has already been stated, the District Court held that the assessments of the Railroads' personal property were prohibited by § 306(1)(d). That subdivision never appeared in any of the bills considered by the Congress in the enactment of § 306 until it was added by the conference committee that agreed on the bill which was finally enacted. There is no legislative history in the congressional committee reports, including Senate Conference Committee Report No. 94-595, relating to § 306(1)(d) that gives any indication of the intended scope and effect of that subdivision and whether it was intended to modify the express jurisdictional limitation contained in § 306(2)(c).

Assuming, *arguendo*, however, that § 306 is ambiguous if § 306(1)(d) and § 306(3)(c) are regarded as being in conflict, the District Court and Court of Appeals were

then obligated to resolve any doubts in favor of the State and to uphold the State's system of taxation and exemption of various kinds of personal property. This obligation arises from the application of the "clear statement" rule when an act of Congress threatens to impinge on an area affecting the delicate federal-state balance of relations.

This "clear statement" policy, though not always denominated as such, runs through a series of Supreme Court cases. In *United States v. Bass,* 404 U. S. 336, 349 (1971), the Court in construing legislation enacted by Congress said:

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 404 U. S. at 349.

In *United States v. Five Gambling Devices, etc.,* 346 U. S. 441, 449 (1953), the Court expressed the same concept in construing a law passed by Congress when it said:

> "The predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question before we undertake a pronouncement which may have far-reaching consequences upon the powers of the Congress or the powers reserved to the several states. To withhold passing upon an issue of power until we are certain it is knowingly precipitated will do no great injury, for Congress, once we have recognized the question, can make its purpose explicit and thereby necessitate or avoid decision of the question."

Also see *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 318 U. S. 261, 275 (1943).

The special applicability of the clear statement rule to federal statutes under the commerce clause—such as the 4-R Act—is discussed in Lawrence H. Tribe's 1978 Treatise on *American Constitutional Law*, from which the following is quoted:

> "§ 5-8. JUDICIAL REVIEW AS SHAPING THE POLITICS OF THE COMMERCE CLAUSE
>
> "Contemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for Congressional action is largely a formality. Nonetheless, federal legislation under the commerce clause may be subject to close judicial scrutiny from several angles. Legislation, even if authorized by the commerce clause, must be consistent with the Bill of Rights and other external restrictions which operate to protect not only individual interests but state interests as well. Moreover, congressional exercises of the commerce power trigger a judicial approach to statutory construction which reinforces the political checks of pluralism and federalism discussed above.
>
> "The Supreme Court pays particularly close heed to statutory language and legislative history in judging the reach of laws enacted under the commerce clause. A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a clear statement that Congress intended to exercise its commerce power in full." Pages 242-243.

Professor Tribe explains that the reason for this rule is that by refusing to construe ambiguous legislation expansively, "the Supreme Court can act to prevent Congress from avoiding hard questions of federal-state relations, and can thus increase the likelihood that Congress will give full attention to the interests of the states and of those groups whose interest parallel the states." *Id.* at 304.

This clear statement policy of interpreting laws enacted by the Congress that impinge on the States in areas involving the federal-state balance is of critical concern when a law enacted by Congress, such as § 306 of the 4-R Act, limits the taxing powers of the States. The right of taxation is one of the most basic and precious rights of sovereignty exercised by the States and its importance has been recognized by the Supreme Court in such cases as *Union Pacific Railroad Company v. Peniston*, 18 Wall. 5, 29, 85 U. S. 5, 29 (1873); *Madden v. Commonwealth of Kentucky*, 309 U. S. 83, 93 (1940); and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 526 (1959).

In citing the three preceding cases it is not the Petitioners' purpose to question the constitutionality of the 4-R Act but only to emphasize the importance of applying the clear statement rule to § 306 if it is considered to be ambiguous when the language of § 306 (1) (d) as applied to the question presented in the instant case is measured against the express limitation on the jurisdiction of the district courts that is provided for in § 306 (2) (c).

If the judgment below is correct as prohibiting discriminatory tax treatment of the personal property of the Railroads, then it also must be understood as creating discriminatory tax treatment in favor of the Railroads' personal property. This is because all other commercial and industrial personal property is assessed and taxed in North Dakota. That personal property is the personal property of all of the other businesses assessed by the State Board of Equalization because it is not exempt under North Dakota law from assessment and taxation. But there is nothing in the legislative history of § 306 that in-

dicates that Congress intended to remove discrimination against railroads and substitute discrimination in their favor.

If the judgment below is correct, then one must ask if the result would be the same if North Dakota had exempted a lesser amount or a very small amount of personal property of locally assessed businesses; for example, only office equipment used by locally assessed businesses or hand tools used by any individual for making small leeather products for sale. Neither the judgment below nor the provisions of § 306 provide any definitive answers to those questions. They presumably would have to be decided by the Federal courts on a case by case basis from the various States. Such questions demonstrate that if § 306 is found to be ambiguous, application of the clear statement rule requires that the doubts be resolved in favor of the taxing power of the States and against extending, by implication only, the scope of relief provided under § 306 (2) (c).

Although the clear statement rule that is applied when interpreting ambiguous acts of Congress is discussed somewhat extensively here, the Petitioners nevertheless submit that § 306 is not in fact ambiguous as applied to the question presented here. This is because exempt personal property is not "subject to a property tax levy" and for that reason cannot be "commercial and industrial property" as defined in § 306 (3) (c); therefore, the District Court did not, and could not, acquire jurisdiction under § 306 (2) (c) to prohibit the State Board of Equalization from assessing the Railroads' personal property because § 306 (2) (c) expressly limits the jurisdiction of the district courts to situations in which the ratio of assessed

value of railroad transportation property to its true market value is compared to the ratio of assessed value of all other commercial and industrial property to its true market value. § 306 (2) (c) plainly does not permit comparison of assessment-market value ratios of railroad transportation property to property that is neither assessed nor taxed and for which an assessment-market value ratio therefore cannot be established.

CONCLUSION

For these reasons a writ of certiorari should issue to review that part of the judgment and opinion of the Eighth Circuit Court of Appeals that relates to the question presented here for review.

Respectfully submitted,

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Dated: October 7, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

Nos. 80-1679 and 80-1738

No. 80-1679

Richard B. Ogilvie, Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation; Soo Line Railroad Company, a corporation; and Burlington Northern, Inc., a corporation,

Appellees,

vs.

The State Board of Equalization of the State of North Dakota and The Honorable Arthur A. Link, as Governor of the State of North Dakota and Chairman of the State Board of Equilization and The Honorable Byron L. Dorgan as Tax Commissioner of the State of North Dakota and Secretary of the State Board of Equilization,

Appellants.

No. 80-1738

Richard B. Ogilvie, Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation; Soo Line Railroad Company, a corporation; and Burlington Northern, Inc., a corporation,

Appellants,

vs.

The State Board of Equalization of the State of North Dakota and the Honorable Arthur A. Link, as Governor

of the State of North Dakota and Chairman of the State Board of Equilization and The Honorable Byron L. Dorgan as Tax Commissioner of the State of North Dakota and Secretary of the State Board of Equilization,

Appellees.

Appeals from the United States District Court
for the District of North Dakota.

Submitted: April 14, 1981
Filed: August 20, 1981

Before LAY, Chief Judge, ROSS, Circuit Judge, and VAN PELT,* Senior District Judge.

VAN PELT, Senior District Judge.

This action was brought by three railroads, to-wit, the Milwaukee (by a trustee), the Soo Line, and the BN, the full names of which are above set forth, as plaintiffs, against The State Board of Equilization of the State of North Dakota, and others above named. A provision of the Railroad Revitalization and Regulatory Reform Act

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*Robert Van Pelt, Senior District Judge, District of Nebraska, sitting by designation.

of 1976, hereinafter called the 4-R Act, vests United States District Courts with jurisdiction to prevent, restrain or terminate acts by a state and others which are prohibited under the 4-R Act. It is claimed that section 306 of the 4-R Act has been violated. Judge Paul Benson heard the case. His decision and order is reported at 492 F. Supp. 446 (D. N. D. 1980).

The two cases before this court involve an appeal and cross-appeal from Judge Benson's order, which prohibited the State Board of Equilization of the State of North Dakota from (1) assessing the plaintiff railroads' personal property, including trade fixtures, for the tax year 1979; and (2) assessing the plaintiff railroads' remaining property at a ratio greater than 13.24% of true market value. On appeal, the appellant State Board contends (1) that the district court erred in failing to include car line companies as "other commercial and industrial property," as that term is used in § 306 of the 4-R Act thus bringing the proper level of assessment to 13.29% of true market value; and (2) that the district court erred in excluding the railroads' personal property from tax assessment.

On cross-appeal, the plaintiff-appellee railroads allege that the district court erred in including public utilities and airline companies as commercial and industrial property, and that if these entities were omitted the proper level of assessment would be 12.2% of true market value instead of the 13.24% level ordered by the district court.

Both parties agree that this case is controlled by § 306 of the 4-R Act.[1] However, they disagree as to the proper interpretation of this statute. The goal of this legislation was "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property."[2]

In order to better understand the Act, it may be helpful to refer briefly to its legislative history. The 86th Congress passed Senate Resolutions 29, 151 and 244 requesting a national transportation policy study. A preliminary draft report of the study presented during the 87th Congress consisted of over 700 pages. A portion of this report concerned ad valorem property taxation of railroads. It is stated in the report that:

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[1]For the reasons stated below, which was footnote 1 in the district court's opinion, both the parties and the district court have referred to the text of the original 4-R Act instead of the later recodification appearing in U. S. C.

> . . . Section 306 was originally codified at 49 U. S. C. § 26c. The Revised Interstate Commerce Act of 1978, Public Law 95-473, 92 Stat. 1337, recodified Subtitle IV of 49 U. S. C. Section 3(a) of the 1978 Revised Act provides that the Revised Act restates, without substantive change, laws enacted before May 16, 1978, and that the recodified Subtitle IV of 49 U. S. C. may not be construed as making a substantive change in the laws replaced. 92 Stat. 1466. The parties agree that the recodification of 49 U. S. C. § 26c at 49 U. S. C. § 11503 substantively changes § 306 of the 4-R Act. The court will therefore refer to and apply § 306 of the 4-R Act as originally enacted throughout this order.

[2]This language comes from the statement of purpose found in S. Rep. No. 1483, 90th Cong., 2d Sess. 1 (1968) accompanying S. 927, and S. Rep. No. 91-630, 91st Cong., 1st Sess. 1 (1969) accompanying S. 2289. Both bills dealt solely with the taxation issue, which was later made a part of the 4-R Act.

> [T]he Association of American Railroads was requested to submit any pertinent information available on relative tax discrimination in the matter of State and local taxes. A Table was submitted by the Association of American Railroads . . . showing the extent of overpayment of railroad ad valorem taxes resulting from the assessment of railroad property at a percent of its value that is higher than the percent which the assessment of other taxpayer property is to the value of such other property. This confirmed the findings of this committee that there is a studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates.

S. Rep. No. 445, 87th Cong., 1st Sess. 458 (1961). The table referred to shows that in 1957 North Dakota assessed railroad property at 50% of value, while assessing all other property at 15.80% of value. *Id.* at 487. There were two proposals in the report to help alleviate the tax burden on railroads. One was a right-of-way exemption. The other proposal was put forth by the Association of American Railroads and was the basis for § 306 of the 4-R Act when it was enacted some 15 years later. An examination of the statute and of the language of the Railroad Association proposal shows the statute's paternity.[3]

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[3] S. Rep. No. 445, *supra*, at 465-66, indicates that the Association of American Railroads:

> proposed Federal law would declare the following action by any State, or governmental subdivision or agency thereof, whether such action be taken pursuant to a State constitutional provision, a statute, an administrative practice, or otherwise, to constitute an unreasonable and unjust burden upon interstate commerce and thereby forbidden and declared to be unlawful:
>
> (a) The assessment, for the purposes of a property tax levied by any taxing district, of property

(Continued on next page)

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owned or used by any common carrier engaged in interstate commerce at a value which bears a higher ratio to the true market value of such property than the assessed value of all other property in the taxing district subject to the same property tax levy bears to the true market value of all such property.

(b) The collection of any tax on the portion of said assessment so declared to be unlawful.

To provide a forum other than at the State level to decide such unlawful assessment and collection of taxes it was further proposed that, notwithstanding the provisions of 28 U. S. C. § 1341, or of the constitution or laws of any State, jurisdiction is to be conferred upon the Federal district courts to enjoin after full hearing, any action declared under the preceding section to be unlawful, such jurisdiction not to be exclusive of that which any Federal or State court may otherwise have.

This proposed antidiscrimination tax bill, which would be available to all common carriers engaged in interstate commerce, has the obvious merit of insuring that such carriers would receive equal treatment with other taxpayers subject to the same tax rates *in accordance with applicable State law*. The proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers.

That portion of § 306 which prohibits the states from discriminatorily taxing transportation property reads as follows:

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which

(Continued on next page)

After the report was submitted to the 86th Congress, bills were introduced in the 87th, 89th, 90th, 91st, 92nd and 94th Congressional sessions dealing with this subject matter.[4] In a report accompanying a bill introduced in the 90th Congress, North Dakota is shown for the year 1965 as having valued railroad property at 45% of value, and property of others at 25% of value, resulting in a 44% excessive tax.[5] In a report accompanying a bill introduced in the 91st Congress, North Dakota is shown for the year 1968 as having valued railroad property at 40% of value, and property of others at 23.40% of value, resulting in a 41.50% excessive tax.[6] In the 94th Congress the House and Senate introduced separate versions of the bill. The main difference between the two was that the Senate bill con-

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(Continued from previous page)

the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any tax which results in discriminatory treatment of a common carrier by Railroad subject to this part."

[4]*See* H. R. 7421, 87th Cong., 1st Sess. (1961); H. R. 4972, 89th Cong., 1st Sess. (1965); S. 927, 90th Cong., 1st Sess. (1967); S. 2289, 91st Cong., 1st Sess. (1969); S. 1891, 93rd Cong., 1st Sess. (1973); S. 2718, 94th Cong., 1st Sess. (1975).

[5]S. Rep. No. 1483, 90th Cong., 2d Sess. 4 (1968).

[6]S. Rep. No. 91-630, 91st Cong., 1st Sess. 5 (1969).

tained a provision that any state having in its constitution a "reasonable classification of property" would be exempt from the provisions of this law. The same provision was rejected as an amendment to the House bill. In the debate it was argued that such a constitutional provision was a form of discrimination in that the constitutions of approximately nineteen states contained such provision. It was further argued that there was nothing to prevent other states from amending their constitutions before the bill took effect, and such action would defeat the bill's purpose. A conference committee composed of members of both houses recommended the adoption of what was substantially the original Senate Bill, minus the constitutional exemption provision. It passed and became § 306, *supra*. The law was to take effect three years after enactment.

From this history, several things are apparent. The language of § 306 finally adopted closely followed that proposed by the Association of American Railroads, as above stated. The purpose of the legislation was to remedy discriminatory taxation against railroads. North Dakota was specifically named as a State which had a history of taxing railroads at a higher and discriminatory rate. Congress was unwilling to create any type of exemption whereby a state would not have to comply with this law,[7] and states were given three years to rectify any discrimination. Appellant State Board of Equilization did

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[7]The only exception is that § 306 does not apply unless the "ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction. § 306(2)(c)."

not change its property tax structure during the three year interim. The parties stipulated that in North Dakota there are four classes of property: (1) farmlands; (2) residential; (3) business real estate; and (4) state-assessed. The first three classes are assessed locally. The State Board of Equilization assesses the fourth class consisting of pipe line companies, electric, gas, heat and water companies, telephone and telegraph companies, mobile radio communication companies, car line companies, and railroads.

Section 306 went into effect on February 5, 1979. The statute provides in § 306 (1) (a) that transportation property may not be subject to a property tax:

> . . . which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

Commercial and industrial property is defined in § 306 (3) (c) as:

> . . . all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy.

Transportation property is defined in § 306 (3) (d) as:

> . . . transportation property, as defined in regulations of the [Interstate Commerce] Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

In 1979, the State Board of Equilization assessed the fourth class of property at 16.8% of the market value of such property. No one disagrees that this was a higher tax than that assessed on "all other commercial and industrial property." The real issue in the case is what constitutes commercial and industrial property. Not surprisingly, the State Board of Equilization urges a definition which would result in the highest rate of taxation, and the railroads urge a definition which would result in the lowest rate of taxation.

In 1979, commercial and industrial property in North Dakota which was locally assessed, was assessed at 12.2% of market value. It was stipulated that if the commercial and industrial property classification includes centrally assessed pipeline companies, electric, gas, heat and water companies, telephone and telegraph companies and mobile radio communication companies as well as locally assessed property, then the railroads' real property would be assessed at 13.2% of true market value. If commercial and industrial property additionally includes airline company property, the railroads' real property would be assessed at 13.24% of true market value. If the term includes all properties other than railroad property, railroad real property would be assessed at 13.29% of true market value.

The district court concluded that the proper definition of commercial and industrial property included all such locally assessed and centrally assessed property with the exclusion of car line companies because they constituted transportation property under the Interstate Commerce definition of the term. The State Board contends that in order to arrive at such a conclusion, the court had

to assume that all of the car line companies' property was held under lease or pooling agreements by common carrier railroads as opposed to property owned or held under lease by nonrailroad companies and placed in service with railroads under tariff arrangements. In support thereof, they cite *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422 (1940) and *Greenville Steel Car Co. v. United States*, 615 F. 2d 911 (Ct. Cl. 1980). These two cases involve sections of either the Tax Reform Act or Interstate Commerce Act which have no relation to the question currently before the court. The ICC definition does not turn on whether property is held under lease by private companies or railroads.[8] Furthermore, it is clear both in the definition itself and in the supplemental information made a part thereof, that this definition was written specifically for use with § 306 of the Railroad Revitalization and Regulatory Reform Act. Under supplemental information to the ICC definition of rail transportation property (*see* Commission order showing decision of December 13, 1978 in ICC docket number 36873), it is stated:

> The Commission believes that section 11503 (a) makes it clear that the definition of "Rail transportation

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[8]The ICC final rule is as follows:

> The Railroad revitalization and Regulatory Reform Act of 1976 made it illegal for a State to levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction. This final rule defines rail transportation property to include all property and other assets that comprise the entire operating unit devoted to the rail transportation service. This revision will provide a uniform definition for State taxing authorities to use in determining ad valorem and other property taxes for railroads.

> property" being adopted in this proceeding applies only for purposes of section 11503. This definition does not affect transportation property as defined by the Internal Revenue Code nor does it affect the tax basis of depreciable property for Federal income tax purposes.
>
> In response to the concern expressed by [Trailer Train Company] and [American Rail Boxcar Company], the Commission has adopted a definition which clearly indicates that rail transportation property includes equipment held under lease or pooling agreements. This has always been the Commission's intent.

Any reference to lease or pooling agreements in the supplemental information only seeks to broaden the definition by including the same, not to limit the definition.

Similarly, lacking in merit is appellee-cross-appellant's contention that only locally assessed property be used in determining the assessment ratio of commercial and industrial property. The Congress excluded agricultural property from the definition of commercial and industrial property, and could have excluded from the definition centrally assessed property or utilities or any other type of property it so desired. The fact is that it did not. We believe the district court was correct in determining that utilities and airlines, etc. constituted commercial and industrial property as that term is used in § 306.

The second issue on appeal is whether the district court erred in finding that the State Board of Equalization could not include personal property and trade fixtures in the assessed value of railroad property, because in North Dakota the personal property of locally assessed businesses is exempt from ad valorem property taxation.

Section 306 (1) (d) prohibits "The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." The State Board of Equilization contends that the district court had no jurisdiction under § 306 (3) (c) because commercial and industrial property is defined as that "which is devoted to a commercial or industrial use and which is subject to a property tax levy." The State Board also argues that there is a strong presumption in favor of the State's broad taxing power, and that the North Dakota Legislature has devised an equitable tax system which does not discriminate against railroads because locally assessed businesses pay an annual business privilege tax in lieu of personal property taxes. We believe the district court was correct when it concluded:

> The intent of Congress in enacting § 306 was to protect interstate rail carriers from discriminatory property taxation. The most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class. The inclusion of personal property in the assessed value of railroad property and other centrally assessed businesses imposes a personal property tax on centrally assessed businesses that is not imposed on locally assessed businesses.

As noted in our review of the history of this section, its purpose was to prevent tax discrimination against railroads in any form whatsoever. Congress rejected a proposed section of the bill which would have granted an exemption to states with a constitution providing for a "reasonable classification of property." North Dakota's rationalization that they have an equitable tax system because of a business privilege tax is nothing more than an

attempt to resurrect, in a different form, an exemption from § 306 for states with a "reasonable classification of property." Congress did not accept the proposal and this court will not accept it. Likewise, the argument that there is a presumption in favor of the states' broad taxing power must fail where the purpose of the legislation was to curb the states' power to inequitably tax railroads.

North Dakota has had a long history of tax discrimination against railroads. It had adequate chance to remedy the situation before this law took effect. Not having done so, the district court properly interpreted both the language and intent of § 306. It correctly determined that personal property of the railroads was exempt from taxation, the same as all other commercial and industrial property, and that the real property of railroads was subject to an assessment ratio of 13.24% of true market value. The judgment and order of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

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Re: 80-1679/1738 Richard B. Ogilvie, etc., et al. v. State Board of Equalization of State of ND, et al.

Dear Sirs:

Opinion of this Court in the above cases was filed and sent to each of you on August 20, 1981. Please make the following corrections:

Equalization is misspelled throughout the entire opinion Pages 1, 2, 3, 8, 9, and 11.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

lkl

cc: Hon. Donald P. Lay, Chief Judge

Hon. Donald R. Ross

Hon. Robert Van Pelt, Senior District Judge

Opposition

Office - Supreme Court, U.S.
FILED
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CLERK

NO. 81-705

In The

Supreme Court of the United States

October Term 1981

THE STATE BOARD OF EQUALIZATION OF THE STATE OF NORTH DAKOTA and THE HONORABLE ARTHUR A. LINK, as Governor of the State of North Dakota and Chairman of the State Board of Equalization, and THE HONORABLE BYRON L. DORGAN, as Tax Commissioner of the State of North Dakota and Secretary of the State Board of Equalization,

Petitioners,

vs.

RICHARD B. OGILVIE, Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation; SOO LINE RAILROAD COMPANY, a corporation; and BURLINGTON NORTHERN INC., a corporation,

Respondents.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the District Court correctly determine that the State's assessment and taxation of railroad personal property and trade fixtures was in violation of Section 306 where the personal property and trade fixtures of all other commercial and industrial taxpayers, except state assessed utilities, was exempt from assessment and taxation?

PARTIES

The parties to this case are accurately listed in the petition, except that, as a result of a reorganization effective May 14, 1981, the name of Burlington Northern Inc. was changed to Burlington Northern Railroad Company. Pursuant to Rule 28.1 of the Revised Rules of the United States Supreme Court, a list of the parent, subsidiary and affiliated corporations of each Respondent is set forth in Appendix A to this Brief.

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NO. 81-705

In The

Supreme Court of the United States

October Term 1981

THE STATE BOARD OF EQUALIZATION OF THE STATE OF NORTH DAKOTA and THE HONORABLE ARTHUR A. LINK, as Governor of the State of North Dakota and Chairman of the State Board of Equalization, and THE HONORABLE BYRON L. DORGAN, as Tax Commissioner of the State of North Dakota and Secretary of the State Board of Equalization,

Petitioners,

vs.

RICHARD B. OGILVIE, Trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation; SOO LINE RAILROAD COMPANY, a corporation; and BURLINGTON NORTHERN INC., a corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, a copy of which is contained in Appendix A to the Petition, was filed August 20, 1981, and is reported at 657 F. 2d 204. The opinion of the United States District Court for the District of North Dakota, a copy of which appears as Appendix B to this Brief, was filed July 2, 1980, and is reported at 492 F. Supp. 446.

JURISDICTION

The jurisdictional statement contained in the petition is adequate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of Constitutional and Statutory Provisions Involved contained in the petition is adequate.

STATEMENT OF THE CASE

Respondents accept Petitioners' "Statement of the Case" subject to the amplifications and corrections set forth hereinbelow.

During taxable year 1979, the year in issue, and several years prior thereto, North Dakota utilized a *de facto* classification system for ad valorem taxation purposes. This *de facto* system consisted of four classes: (1) farmlands; (2) residential; (3) business real estate; and (4) state-assessed properties (492 F. Supp. 448). The first three classes are assessed by local assessors. The fourth class is assessed by Petitioner, North Dakota State Board of Equalization (hereinafter "State Board"). Class three, business real estate, consists of all commercial and industrial real property not assessed by the State Board. This class is limited to commercial real estate because virtually all commercial and industrial personal property

and trade fixtures, except that which is assessed by the State Board, is exempt from ad valorem taxation. North Dakota Century Code § 57-02-08(25).[1] Class four, state-assessed properties, includes railroads, public utilities and nonpublic utility transportation companies. These railroad and utility properties are subject to ad valorem taxation on both their real and personal property and trade fixtures.

For taxable year 1979, railroads' and utilities' real and personal property was assessed at a ratio 16.8 percent of its fair market value. Commercial and industrial real estate was assessed and equalized on a statewide basis at 12.2 percent of its fair market value, or some 38 percent lower than state-assessed property. Commercial and industrial personal property and trade fixtures, not assessed by the State Board, escaped taxation altogether.

As a result of the State Board's 1979 assessments of the railroads' operating property, the Respondent Railroads (hereinafter "Railroads") brought the instant action pursuant to Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976[2] in the United States

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[1]Section 57-02-08(25) North Dakota Century Code is set forth at page 7 of the petition.

[2]Pub. L. No. 94-210, 90 Stat. 31 (Feb. 5, 1976). Section 306-90 Stat. 54, was codified at 49 U. S. C. § 26c (1976). On October 13, 1978, certain statutes related to transportation were collected, revised, codified, and enacted as Title 49 of the United States Code; 49 U. S. C. § 26c became § 11503. The language of 49 U. S. C. § 11503 as codified differs somewhat from the language of Section 306 as enacted. Because 49 U. S. C. § 11503 cannot be construed as making any substantive change to the meaning of Section 306, see Section 3(a) of Pub. L. No.

(Continued on next page)

District Court for the District of North Dakota. In their complaint, the Railroads asserted their 1979 assessments were invalid to the extent they violated Section 306. The Railroads requested the District Court to prohibit: (1) any assessment of railroad transportation property at a ratio to fair market value that exceeded the ratio applicable to other commercial and industrial property; and (2) to declare invalid any assessment of railroad personal property and trade fixtures because other commercial and industrial personal property and trade fixtures was not subject to such an assessment.

The parties stipulated, among other things, that Section 306 was a valid and constitutional statute and that "transportation property," as defined in Section 306, was the same property that was subject to assessment by the State Board. The State Board conceded that Section 306 was applicable to the 1979 taxable year. All parties moved for summary judgment.

The District Court held and the Court of Appeals affirmed that (1) a proper interpretation of the facts stipulated by the parties reflected that the ratio to fair market value applicable to commercial and industrial property was 13.24 percent and any assessment of Railroads' property at a ratio in excess of 13.24 percent was violative of Section 306(1)(a); and (2) that the assessment and taxation of railroad personal property and trade fixtures when all other personal property and trade fixtures, except those

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95-473, 92 Stat. 1466, the Respondents will refer to the original language of Section 306 in this Brief and will refer to 49 U. S. C. § 11503 as "Section 306." A copy of Section 306 is set forth at pages 3-6 of the Petition.

belonging to state-assessed utilities, was exempt, represented a discriminatory tax in violation of Section 306(1)(d). The Petitioners have limited their Petition to the second holding involving the personal property exclusion.

In the final paragraph of Petitioners' "Statement of the Case" (page 11 of the Petition) a statement is made that the District Court predicated jurisdiction upon Section 306(1)(d). This statement is in error. The District Court specifically found that Section 306(2) vests the Federal district courts with jurisdiction (492 F. Supp. 446, 449) and that the 5 percent jurisdictional requirement of Section 306 (2) (c) was exceeded in the instant action (492 F. Supp. 446, 450 n. 3 and 451 n. 4).

REASONS FOR DENYING THE WRIT

1. There Are No Special or Important Reasons for Granting the Writ in This Case.

Petitioners assert that their petition should be granted because of the great significance of the decision below to every state that taxes the property of railroads operating in interstate commerce. Further, they assert that the decision below potentially affects the authority of all the states to devise state taxing systems that are compatible with Section 306. Nothing could be further from the truth.

The decision below only has immediate applicability to those states that exempt the personal property of their commercial and industrial taxpayers but not the personal property of railroads and other utilities. Respondents

are aware of only one other state, apart from North Dakota, with such a taxation scheme.[3] Obviously, the decision below does not have the great breadth that Petitioners assert. Furthermore, the decision below is entirely consistent with other decisions of Courts of Appeal and Federal District Courts that have interpreted Section 306.

In *Tennessee v. Louisville and Nashville R. R.*, 478 F. Supp. 199 (M. D. Tenn. 1979), *aff'd.* No. 79-1515 (6th Cir. March 20, 1981), *cert. denied*, No. 80-2141 (October 5, 1981), the State of Tennessee, by statute, assessed the personal and real property of railroads at 55 percent of market value. Commercial and industrial real and personal property was assessed at 40 percent and 30 percent, respectively, of market value. The court ordered that railroads' assessments be lowered to the commercial and industrial levels. Therefore, railroad personal property assessments were lowered to the 30 percent level enjoyed by commercial and industrial personal property. The assessment level of railroad personal property was likewise lowered to the commercial and industrial level in Louisiana. *Louisville and Nashville R. R. v. Louisiana Tax Comm'n*, 498 F. Supp. 418 (M. D. La. 1980). In the instant action North Dakota's *de facto* commercial and industrial property class was exempt from ad valorem tax on its personal property. Therefore, the equality re-

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[3]Section 10-4-6.1(13), South Dakota Compiled Laws, exempts all personal property that is not centrally assessed from ad valorem taxation. At least one other state, Minnesota, enacted legislation in 1979 to exempt railroad personal property because other commercial and industrial personal property was exempt. *See*, Minnesota Statutes Annotated, § 270.81(4).

quired by Section 306 necessitates that railroad personal property be treated in a like manner.

Indeed, under the Petitioners' viewpoint it would be a clear violation of Section 306 if North Dakota assessed commercial and industrial personal property at .0001 percent of market value and railroad personal property continued to be assessed at 16.8 percent. But if commercial and industrial property is exempt (-0-), then under Petitioners' viewpoint no violation has occurred. It strains credulity to believe the intent of Congress may be so easily undermined or that North Dakota's approach is any less discriminatory than Tennessee's or Louisiana's.

With regard to Petitioners' assertion that the decision below affects the ability of all the states to devise taxing systems that are consistent with Section 306, the Petitioners' quarrel is more with the legislation itself than the decision below. Section 306 only requires that railroad property not be assessed or taxed differently than other commercial and industrial property or otherwise discriminated against. It does not displace a state's authority to devise taxing systems. *Arizona v. Atchison, Topeka and Santa Fe R. R.*, No. 78-655 (Jan. 26, 1979), *aff'd*, 656 F. 2d 398 (9th Cir. 1981). Indeed, all that Section 306 actually mandates is that a state taxing system not discriminate against railroads.

This case represents nothing more than a determination by the courts below that North Dakota's system of taxation was discriminating against railroad personal property and was accordingly in violation of Section 306. Petitioners admit this case does not raise a constitutional question. Further, it does not present any important or

novel question regarding the applicability of a Federal statute. Finally, contrary to the assertions in the petition, it does not even present an issue regarding Federal district court jurisdiction under Section 306.

2. The Decisions Below Do Not Present a Jurisdictional Issue or Any Novel Question as to the Interplay of State and Federal Laws.

The chief contention of the Petitioners is that the District Court did not have the jurisdiction under Section 306 to find that North Dakota's ad valorem taxation of railroad personal property was discriminatory and in violation of the Statute. This contention is based on Sections 306 (2) (c) and (3) (c) which provide as follows:

> (c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.
>
> (3) As used in this section, the term—. . .
>
> (c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land use primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy.

The interpretation of these two subsections urged by Petitioners is that subsection (3) (c) limits the definition of "commercial and industrial property" to property devoted to a commercial or industrial use and subject to a property tax levy. Therefore, the Petitioners assert that

because commercial and industrial personal property in North Dakota is exempt, it is not subject to a property tax levy, and cannot be utilized in meeting the 5 percent ratio differential required by Section 306 (2) (c). In short, it is Petitioners' position that inasmuch as commercial and industrial personal property is exempt from ad valorem taxation, and Section 306 (2) (c) envisions a comparison with all other commercial and industrial property, then Section 306 does not apply since there is no tax or assessment to form a comparison against. This position is not supported by the facts of this case, the language of Section 306 or the legislative history of the statute.

The error in Petitioners' contention is best understood by reference to Section 306 itself. Section 306 (2), the jurisdictional mandate, provides as follows:

> (2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

The acts prohibited by Section 306 are set forth in subsection (1) of the statute as follows:

> (1) Notwithstanding the provisions of section 202 (b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on interstate commerce. It is unlawful for a State, a political subdivision of a State, or a government entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

The only limitation imposed upon the Federal district courts' jurisdiction to deal with these enumerated violations, as relevant to this case, is the 5 percent differential of Section 306 (2) (c). The purpose behind this 5 percent limitation is explained in the legislative history[4] of the

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[4]The legislative history of Section 306 can be traced back to the so-called "Doyle Report" which was published in 1961 as Senate Report No. 445, 89th Congress. The "Doyle Report" observed that railroad operating property was routinely subjected to discriminatory taxation by the states and recommended that national legislation be enacted to provide relief from unduly burdensome state taxes on interstate commerce. During the following 15 years Congress considered and studied numerous proposals that were substantially identical to both the antidiscrimination tax bill recommendation of the "Doyle Report" and Section 306 as finally enacted. Inasmuch as these

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Statute as follows:

> The third amendment provides a 5-percent tolerance factor to protect taxing districts from the issuance of an injunction or other restraining process in case of an insignificant variation in assessments, which usually results from uncertainties inherent in the assessment process. The amendment appears as the second proviso in paragraph (3) of the bill, and withdraws from the courts any powers under S. 2289 to issue restraining process in any case wherein the variance of assessment between the carrier's property and all other property in the assessment jurisdiction is less than 5 percent. Thus, if the assessment of all other property is at 50 percent of true market value, and the assessment of the carrier's transportation property is less than 52.5 percent, no injunction or other restraining process may be issued by a court under S. 2289.

S. Report 91-630, 91st Cong., 1st Sess. (1969) at 14.

In *Louisville and Nashville R. R. v. Louisiana Tax Comm'n, supra* at 423, the court explained the 5 percent differential as follows:

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predecessor bills were substantially identical to and evolved directly into Section 306, they are clearly part of the legislative history of Section 306. *See, Transcontinental and Western Air, Inc. v. C. A. B.*, 336 U. S. 601, 605, 93 L. Ed. 911, 915 n. 6 (1948). The following is a compilation of the legislative history of Section 306. *See,* H. R. 7421, 87th Cong., 1st Sess. (1961); H. R. 7497, 87th Cong., 1st Sess. (1961); H. R. 736, 88th Cong., 1st Sess. (1963); H. R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong., 2d Sess. (1966); H. R. 1480, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong., 2d Sess. (1968); S. Rep. No. 1483, 90th Cong., 1st Sess. (1968); S. 2289, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); H. R. 16245, 91st Cong., 2d Sess. (1970); S. 2841, 92d Cong., 1st Sess. (1971); S. 3945, 92d Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973); S. Rep. No. 94-499, 94th Cong., 2d Sess. (1976).

> The 5 percent differential was included simply because the Congress was not concerned with insignificant variations that might develop in state assessment practices and therefore authorized injunctive relief only where the differential actually exists. . . . The 5 percent variance is simply a threshold authorization for injunctive relief. When the state crosses the threshold, however, the statute authorizes complete injunctive relief.

498 F. Supp. at 423.

In the instant action, the District Court specifically found that the 5 percent threshold was exceeded, i. e., by 27 percent, with reference to the differential in ratios between commercial and industrial real property (13:24 percent) and the ratio applied to railroads (16:8 percent). 492 F. Supp. 446, 451 n. 4. In fact, Petitioners had conceded at least a 26 percent differential. 492 F. Supp. 446, 450. Once this threshold requirement was met, the Court was not required by Section 306 to make further jurisdictional inquiry. Petitioners' contention that the District Court below lacked jurisdiction to decide the personal property issue because of Section 306 (2) (c) is without foundation in law or fact.

Petitioners also argue that their assessment and taxation of railroad personal property cannot be discriminatory because Section 306 (3) (c) only defines commercial and industrial property as that which is subject to property tax levy. In essence, they imply that Section 306 may not be violated if a state merely exempts the entire comparison class. The principal problem with this assertion is that Section 306 (1) (d), which the courts below found North Dakota's classification to violate, does not

turn on the "commercial and industrial property" definition of 306 (3) (c). Section 306 (1) (d) provides:

> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

The courts below found that North Dakota's treatment of railroad personal property violated subsection (1) (d).[5] The District Court below explained its conclusion as follows:

> The intent of Congress in enacting § 306 was to protect interstate rail carriers from discriminatory property taxation. The most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class. The inclusion of personal property in the assessed value of railroad property and other centrally assessed businesses imposes a personal property tax on centrally assessed businesses that is not imposed on locally assessed businesses.

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[5]While Respondents fully concur that Section 306(1)(d) was violated, there is convincing legislative history to suggest that the North Dakota system of assessing railroad personal property also violates Section 306(1)(a). The legislative history of the statute indicates that Congress only intended that traditional types of exempt property "such as churches, charitable institutions, homesteads and the like" be excluded from the comparison class. S. Rep. 91-630, 91st Cong., 2d Sess. (1969) at 11. This being the case, North Dakota's exempt commercial and industrial personal property would have to be compared with railroad personal property under Section 306(1)(a). It is difficult to imagine that Congress would have permitted a state to avoid the prohibitions of Section 306 by simply exempting its entire comparison class. Indeed, if this were true, such a state could tax railroads at whatever level it wished with impunity. It is a fundamental principle of statutory construction that a statute be construed to give effect to the intent of Congress. *See, e. g., U. S. v. American Trucking Ass'n,* 310 U. S. 534, 542, 84 L. Ed. 1345, 1350 (1940).

> The court therefore concludes that defendants have violated § 306 (1) (d) by including personal property in the assessed value of plaintiffs' property. Such inclusion results in the imposition of a personal property tax on railroads that is not imposed on locally assessed businesses. The imposition of such a tax is discriminatory when railroad property is compared to all other property as a whole, excluding traditionally exempt property of churches, charitable institutions, homesteads and the like. The imposition of a personal property tax on other centrally assessed businesses does not render defendants' actions toward plaintiffs nondiscriminatory.

This reasoning was quoted with approval by the Court of Appeals (657 F. 2d 204, 210).

It is significant to note that Petitioners do not deny that railroad personal property is being discriminated against in North Dakota. Instead they seek to justify such discrimination by asserting that all utilities and railroads are treated the same. In short, Petitioners argue that because other centrally assessed utilities are subject to a tax on their personal property, railroads should not be treated any differently. This argument is substantially identical to the arguments that were made and rejected in the Tennessee and Arizona cases. *Tennessee v. Louisville and Nashville R. R., supra* at 201-202; *Arizona v. Atchison, Topeka and Santa Fe R. R. Co., supra* at 403. In fact, the North Dakota arguments fly squarely in the face of the very purpose for which Section 306 was enacted.

The legislative history of Section 306 is replete with references that Congress intended railroad real and personal property to be accorded equal tax treatment. Section 306 is remedial legislation enacted to accomplish this end pursuant to the authority of Congress to protect interstate commerce from state taxation. *Arizona Pub. Serv. Co. v.*

Snead, 441 U. S. 141, 150, 99 S. Ct. 1629, 1634 (1979). It is no answer for North Dakota to contend its discrimination is justified because it also discriminates against other centrally assessed utilities.

CONCLUSION

Petitioners have failed to demonstrate any special or important reason for granting certiorari in this case. There is no jurisdictional issue or any novel questions regarding the interplay of federal and state laws. Respondents respectfully submit that the petition for writ of certiorari should be denied.

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APPENDIX A

Richard B. Ogilvie, Trustee of the Property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Parent: Chicago-Milwaukee Corporation

Subsidiaries (except wholly-owned):

Chicago, Terre Haute and Southeastern Railway Company

Affiliates:

Chicago Union Station Company
Davenport, Rock Island and North Western Railway Company
Des Moines Union Railway Company
Indiana Harbor Belt Railway Company
Kansas Terminal Railway Company
Longview Switching Company
Minnesota Transfer Railway Company
Northern Tier Pipeline Company
Pullman Company
Trailer Train Company

Soo Line Railroad Company

Parent: Canadian Pacific Ltd.

Affiliates:

Lake Superior Terminal & Transfer Railway Company
Minnesota Transfer Railway Company
Saint Paul Union Depot Company
Sault Ste. Marie Bridge Company
The Belt Railway Company of Chicago

Burlington Northern Railroad Company

Parent: Burlington Northern Inc.

Subsidiaries (except wholly-owned):

Camas Prairie Railroad Company
The Colorado and Southern Railway Company

Davenport, Rock Island and North Western Railway Company
Forth Worth and Denver Railway Company
Galveston Terminal Company
The Lake Superior Terminal and Transfer Railway Company
Minnesota Transfer Railway Company
NZ Development Company
NZ Properties, Inc.
Portal Pipe Line Company
Western Fruit Express Company
Winona Bridge Railway Company

Affiliates:

The Belt Railway Company of Chicago
Burlington Northern Air Freight (Aust.) Pty. Limited
Butte Pipe Line Company
Chicago Union Station
The Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

APPENDIX B

Richard B. OGILVIE, Trustee of the Property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation; Soo Line Railroad Company, a corporation; and Burlington Northern, Inc., a corporation, Plaintiffs,

v.

The STATE BOARD OF EQUALIZATION OF THE STATE OF NORTH DAKOTA, and The Honorable Arthur A. Link, as Governor of the State of North Dakota and Chairman of the State Board of Equalization, and The Honorable Byron L. Dorgan, as Tax Commissioner of the State of North Dakota and Secretary of the State Board of Equalization, Defendants.

Civ. No. A3-79-183.

United States District Court,
D. North Dakota,
Southeastern Division.
July 2, 1980.

ORDER

BENSON, Chief Judge.

Plaintiffs in the above entitled action contend defendants have violated § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) by discriminatory property tax treatment of plaintiffs' rail transportation property. Plaintiffs seek declaratory relief. An order enjoining defendants, their successors, their agents or employees and those in active concert or participation with them, including the County Treasurers of the fifty-three counties of the State of North Dakota, from collecting the disputed portions of property tax payments due from plaintiffs was entered on February 21, 1980.

Pursuant to the court's order, the disputed taxes were deposited with the Clerk of Court. There are now before the court cross motions for summary judgment pursuant to F. R.Civ. P. 56. The parties have entered into a stipulation of facts, and there is no genuine issue as to any material fact.

FACTS

Plaintiffs are regulated rail carriers engaged in interstate commerce in and through the State of North Dakota. Defendant State Board of Equalization (the Board) is an administrative agency of the State of North Dakota. One of the duties of the Board is to assess annually at its actual value the operating property, including franchises, of railroads operating in North Dakota. N. D. Cent. Code § 57-05-01. The assessed valuation of railroad property is to be certified to the respective counties of North Dakota, N. D. Cent. Code § 57-05-04, for collection of property taxes by the County Treasurers. N. D. Cent. Code § 57-20-07.

There is *de facto* classification of property in North Dakota for property tax purposes. *Soo Line Railroad Co. v. State of North Dakota,* 286 N. W. 2d 459, 465 (N. D. 1979). There are four classes of property: (1) farmlands; (2) residential; (3) business real estate; and (4) state-assessed. The first three classes of property are locally assessed. The fourth class is centrally assessed by the Board. Puruant to § 179 of the North Dakota Constitution, railroad property, N. D. Cent. Code ch. 57-05, public utilities, ch. 57-06, and car line, express and air transportation companies, ch. 57-32, are centrally assessed by the Board.

Railroad property subject to assessment by the Board is "transportation property" as that phrase is used in § 306 of the 4-R Act.

At its annual meeting in August 1979 the Board assessed for taxable year 1979 the operating property of railroads, public utilities, car line, and air transportation companies at 16.8 percent of the true market value of such property. The assessed value of 16.8 percent of true market value was administratively determined by the Board without reference to a sales assessment ratio study.

Commercial and industrial real property that is locally assessed was assessed and equalized for the taxable year 1979 at 12.2 percent of the true market value of such property. The figure of 12.2 percent is a state-wide aggregate mean ratio developed by means of a sales assessment ratio study conducted by the State Supervisor of Assessments.

The assessed value for property taxation purposes of centrally assessed property includes personal property and trade fixtures. The assessed value for property taxation purposes of locally assessed property does not include personal property and trade fixtures. N. D. Const. § 179; N. D. Cent. Code § 57-02-08 (25). The portion of the final assessed 1979 valuation of plaintiffs' property attributable to the inclusion of personal property and trade fixtures is as follows: Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 42.93 percent; Soo Line Railroad Company, 50.11 percent; Burlington Northern, Inc., 49.29 percent.

JURISDICTION AND ISSUES

Section 306(1) of the 4-R Act[1] declares the following acts by a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision, to be prohibited:

> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

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1. Public Law 94 210, 90 Stat. 31,54, codified at 49 U. S. C. § 11503. Section 306 was originally codified at 49 U. S. C. § 26c. The Revised Interstate Commerce Act of 1978, Public Law 95-473, 92 Stat. 1337, recodified Subtitle IV of 49 U. S. C. Section 3 (a) of the 1978 Revised Act provides that the Revised Act restates, without substantive change, laws enacted before May 16, 1978, and that the recodified Subtitle IV of 49 U. S. C. may not be construed as making a substantive change in the laws replaced. 92 Stat. 1466. The parties agree that the recodification of 49 U. S. C. § 26c at 49 U. S. C. § 11503 substantively changes § 306 of the 4-R Act. The court will therefore refer to and apply § 306 of the 4-R Act as originally enacted throughout this order.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

Subsection (2) of § 306 vests the federal district courts with jurisdiction to grant relief necessary to prevent, restrain, or terminate any acts in violation of § 306(1), if the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least five percent the ratio of assessed value to true market value with respect to all other commercial and industrial property in the same assessment jurisdiction.

"Commercial and industrial property" is defined in § 306(3)(c) as "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; . . . ." "Transportation property" is defined in § 306(3)(d) as "transportation property, as defined in regulations of the [Interstate Commerce] Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

The parties have stipulated that § 306 was enacted by Congress pursuant to its power to regulate commerce among the states and is thus a valid and constitutional statute.

Plaintiffs contend that defendants have violated § 306 in two respects. First they allege that the assessment for property taxation purposes of rail transportation property at 16.8 percent of true market value, while locally

assessed commercial and industrial property (business property is assessed for property taxation purposes at only 12.2 percent of true market value, expressly violates § 306(1)(a). Second, plaintiffs allege that the inclusion of their personal property and trade fixtures in the assessed value of their rail transportation property, while personal property and trade fixtures are not included in the assessed value of locally assessed business property, violates the express terms of § 306(1) and conflicts with the purpose and effect of § 306.[2]

The court notes that § 306 applies to the 1979 tax year. Section 306 did not become effective until February 5, 1979, three years after its enactment. Section 306(2)(b). The actions of defendants claimed to be unlawful, the higher assessment for railroad property than for locally assessed business property, and the inclusion of personal property and trade fixtures in the assessed value of railroad property, took place in August 1979 at the annual meeting of the State Board of Equalization. Section 306 prohibits the assessment, levy, and collection of discriminatory property taxes. The assess-

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2. It appears that the different treatment for property taxation purposes of railroad property compared with locally assessed business property does not violate the federal constitutional rights of plaintiffs. A state may classify property for taxation purposes, may set up different modes of assessment, valuation, and collection, and may tax some kinds of property at higher rates than others, without violating the due process or equal protection rights of the class of taxpayers receiving differential treatment. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U. S. 362, 368, 60 S. Ct. 968, 971, 84 L. Ed. 1254 (1940). Thus railroads and other utilities may be treated differently than other types of property for property taxation purposes without violating the Fourteenth Amendment. *Id.*

ment, levy and collection of property taxes for the taxable year 1979 all took place or were to take place after February 5, 1979, and were thus subject to the constraints of § 306. *See Alabama Great Southern Railroad Company v. Eagerton*, 472 F. Supp. 60, 63 (N. D. Ala. 1979).

DIFFERENTIAL ASSESSMENT RATIOS

Plaintiffs contend that the assessment for property taxation purposes of their railroad operating property at 16.8 percent of true market value, while locally assessed business property is assessed for property taxation purposes at 12.2 percent of true market value, violates § 306 (1) (a) of the 4-R Act.[3] Plaintiffs further contend that the assessment ratio for their property should be reduced to 12.2 percent.

Defendants admit that the different assessment ratios for the two classes of property violate § 306, but they contend that the 1979 assessment ratio on plaintiffs' property should not be reduced to 12.2 percent, but should only be reduced to 13.29 percent. Defendants' contention is based on the language of § 306 (1) (a), which prohibits the assessment of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of *all other commercial and industrial property* in the same assessment jurisdiction bears to the true market value of *all such other commercial and industrial property*. It is

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3. The ratio of assessed value to true market value of railroad property exceeds the ratio of assessed value to true market value of locally assessed business real property by approximately 38 percent, well in excess of the five percent jurisdictional requirement of § 306 (2) (c).

argued that the 12.2 percent figure does not represent the assessment ratio for all other commercial and industrial property in the same assessment jurisdiction, *i. e.*, the State of North Dakota. 12.2 percent is the assessment ratio for locally assessed business real property, which ratio is uniform throughout the state. Centrally assessed commercial and industrial property other than railroad operating property is assessed at 16.8 percent of true market value. Such property includes pipe line companies, electric, gas, heat and water companies, telephone and telegraph companies, and mobile radio communication companies, centrally assessed by the Board pursuant to N. D. Cent. Code ch. 57-06, and also includes airline companies and car line companies centrally assessed by the Board pursuant to N. D. Cent. Code ch. 57-32. If the assessed value of the property of companies, other than railroads, which is centrally assessed by the Board is included in the commercial and industrial classification, the average percentage of market value at which all other commercial and industrial property in the State of North Dakota was assessed for property taxation purposes for the taxable year 1979 is 13.29 percent. Stipulation of Facts, ¶ 4(f). If the assessed value of car line companies is not included in the commercial and industrial classification, the average percentage of market value at which all other commercial and industrial property in North Dakota was assessed in 1979 is 13.24 percent.[4] Stipulation of Facts, ¶ 4(e).

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4. The 16.8 percent assessment ratio for railroad property exceeds the 13.24 percent and 13.29 percent figures by 27 and 26 percent respectively, also in excess of the five percent jurisdictional requirement of § 306 (2) (c).

In arguing that the assessment ratio for railroad operating property should be reduced to 12.2 percent of true market value, plaintiffs rely on § 306 (2) (e) of the 4-R Act, which provides as follows:

> (e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property had been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

Plaintiffs contend that centrally assessed commercial and industrial property other than railroad operating property may not be considered in determining the average state-wide assessment ratio for all other commercial and industrial property because the assessed value of

such property was not determined by means of a sales assessment ratio study, but was administratively determined by the Board. Because the only commercial and industrial property for which a sales assessment ratio study was conducted is locally assessed business real property, plaintiffs argue that only such property may be considered in determining the assessment ratio for all other commercial and industrial property. In the alternative, plaintiffs argue that because the assessment ratio for *all* commercial and industrial property cannot be determined by means of a sales assessment ratio study, the assessment ratio for their operating property should be reduced to the assessment ratio for all other property in the state, pursuant to the alternative procedure of § 306 (2) (e), *supra*. The average statewide percentage of assessed to market value for all taxable property except railroads in North Dakota for 1979 is 8.6198 percent. Letter of Kenneth M. Jakes to Frank Magill, April 14, 1980. Appendix C to plaintiffs' motion for summary judgment.

[1] The court concludes that for purposes of § 306 (1) (a) of the 4-R Act the assessment ratio of railroad property is to be compared with the average assessment ratio for all other commercial and industrial property for which an assessment ratio can be established to the satisfaction of the court, regardless of whether that ratio was established by means of a sales assessment ratio study. The court will not construe § 306 (2) (e) so as to hold that the only means of establishing assessment ratios is by a sales assessment ratio study. The legislative history of § 306 indicates that a sales assessment ratio study is the customary and perhaps preferred method of determining

the composite level of assessment, but it does not indicate that such a study is the only method for so determining. If an average assessment ratio for all other commercial and industrial property can be established, relief may be granted under § 306 to the extent the assessment ratio for railroad property exceeds the average assessment ratio for all other commercial and industrial property. *See* S. Rep. No. 1483, 90th Cong., 2d Sess., Appendix C, at 23 (1968).[5]

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5. Appendix C to S. Rep. No. 1483 provides in full as follows:

> The purpose of the bill is to provide relief for common carriers from discriminatory property taxes whether through assessments or through rates. The test of discrimination as applied to assessments is to show the taxes which are based upon an assessment of the carrier's property at a higher proportion of its true market value than the proportion at which other taxpayers are assessed upon their property in the same taxing district. In making this comparison, the bill contemplates the relationship between a common carrier's property and that of the "average" taxpayer in the taxing district. However, the word "average" has a precise arithmetical connotation which makes it unsuitable in this context.
>
> For simplicity, therefore, the phrase "all other property in the taxing district" has been used as the equivalent of the property of the "average" taxpayer there. Thus the words "all other property" are to be construed as meaning property in the aggregate, and not invidiually as separate parcels or kinds of property. The reason is obvious since, if the latter were the case, the carrier would be entitled to look for the particular parcel of property in the taxing district which was assessed lowest of all (that is, at a lower percentage of its true market value than the percentage applicable to any other parcel in the entire district) and demand similar treatment. This is not the purpose of the legislation for such an interpretation would merely remove discrimination against common carriers and substitute discrimination in their favor.

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[2] In this case the court holds that defendants have violated § 306 (1) (a), and that the ratio of assessed value to true market value of plaintiffs' railroad operating property must be reduced to 13.24 percent. The figure of 13.24 percent is arrived at by including the assessed value of

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Likewise, it is possible that in a particular taxing district there might be a parcel of property owned by another taxpayer which is assessed at a higher proportion of its true market value than that applied to the carrier's property. In such a case, if it were necessary to consider each individual parcel of property in applying the bill's standards, it would mean that the carrier would be entitled to no relief, merely because there was one other taxpayer who suffered an even greater discrimination.

Therefore, in order to make possible the fairest comparison—that of the carrier with the hypothetical "average" taxpayer—the unit to be used is that of all parcels of property in the district, considered in the aggregate.

Proof of the composite level of assessment of this property would customarily be submitted by means of the results of a so-called "Sales/assessment ratio test." In such a test, various data—the assessed value, sales price, type of property, and other relevant factors—are recorded from a random selection of parcels or real estate which have been sold in arm's length sales between willing buyers and willing sellers. From eligible transactions comprising the sample various ratios are computed, with consideration being given to both urban and rural property, and a weighted average is determined and expressed in terms of an assessment ratio, or, in other words, the percentage of true market value at which the property in the sample is assessed. This result can be statistically demonstrated to be accurately representative of the level of assessment of "all other property" in the geographical area (i. e., taxing district) represented by the sample.

It follows, therefore, that a carrier may obtain the relief provided for in the bill by demonstrating that its property is assessed at a higher proportion of its true market value than the proportion at which all other property in the taxing district, in the aggregate, is assessed.

public utilities and airline companies in the commercial and industrial classification and computing an average percentage of market value for all nonrailroad commercial and industrial property, except for car line companies. Car line companies are excluded from "all other commercial and industrial property" because the property of such companies is used by rail carriers. The Interstate Commerce Commission definition of rail transportation property includes within the definition of rail transportation property equipment held by a carrier under lease or pooling agreements.[6] Car line company property assessed by the Board is therefore "transportation property."

The assessment ratio for centrally assessed commercial and industrial property has not been established by means of a sales assessment ratio study, but it has been established to the satisfaction of the court by other means. The parties have stipulated that the assessment ratio for such property is 16.8 percent. The method of assessment is immaterial as long as the level of assessment can be established. A sales assessment ratio study is not itself a method of assessment, but is merely a means of equalizing differing assessments by local assessors to arrive at a uniform assessment ratio for locally assessed property. The same result, a uniform assessment ratio, was achieved for centrally assessed property by administrative determination of the Board. The ratio of assessed value to true market value for *all* other commercial and industrial property has been determined by aggregating

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6. *See* I. C. C. Definition of Rail Transportation Property, docket number 36873, Jan. 1, 1979.

the assessed values of locally and centrally assessed property and determining therefrom the average ratio.[7]

Plaintiffs' motion for summary judgment on their claim that the ratio of assessed to market value of their property is unlawful under § 306 (1) (a) of the 4-R Act will be granted insofar as the ratio exceeds 13.24 percent.

INCLUSION OF TRANSPORTATION PERSONAL PROPERTY IN ASSESSED VALUE

Plaintiffs contend that the inclusion of personal property and trade fixtures in the assessed value of their operating property, while the personal property of locally assessed business is exempt from ad valorem property taxation, violates § 306 of the 4-R Act. Defendants contend that § 306 does not deny to the state the power to

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7. Plaintiffs contend it is inappropriate to add the assessed value of centrally assessed properties to achieve a composite ratio because the composite would include value attributable to personal property. It is alleged that the resulting ratio would not be comparable with the real property which is the basis for the comparison. This argument is without merit. The comparison to be made is with all other commercial and industrial property for which an assessment ratio can be established to the satisfaction of the court. Commercial and industrial property includes personal property, if it is subject to a property tax levy. Section 306 (3) (c). Centrally assessed commercial and industrial personal property is subject to a property tax levy, so it is properly considered when determining the composite ratio of assessed to market value. Because the personal property of locally assessed businesses is not subject to a property tax levy, it is not commercial and industrial property for purposes of § 306 and may not be considered when determining the composite ratio.

classify property and to exempt certain classes of property from taxation.

The inclusion of personal property and trade fixtures in the assessed value of railroad property does not violate § 306(1)(a), (b) or (c). Subsection (1)(a) prohibits a higher ratio of assessed value to true market value for transportation property than for all other commercial and industrial property. The inclusion of personal property in the assessed value of railroad property affects the total assessed value of the railroad property, but it does not affect the assessment ratio. Because the inclusion of personal property does not violate § 306(1)(a), a levy or collection of an assessed tax would not violate § 306(1)(b) merely because of the inclusion of personal property.

Subsection (1)(c) prohibits the levy or collection of any property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property. Plaintiffs contend that subsection (1)(c) has been violated by the inclusion of personal property in the assessed value of their property because the personal property of locally assessed businesses, being exempt from taxation, is taxed at a rate of zero percent. However, the personal property of locally assessed businesses is not commercial and industrial property for purposes of § 301(1)(c), for § 306(3)(c) defines commercial and industrial property as property devoted to a commercial or industrial use and *which is subject to a property tax levy.* Locally assessed business real property is commercial and industrial property for purposes of § 306, but business personal property is not because it is not subject to a property tax levy. Transportation personal property cannot, therefore, be compared with busi-

ness personal property in determining whether § 306(1)(c) has been violated. Plaintiffs do not contend that the tax rate applied to their property is higher than that applied to business real estate. There has therefore been no violation of § 306(1)(c).

Section 306(1)(d) prohibits the imposition of any other tax which results in discriminatory treatment of a common carrier by railroad. Defendants contend that because subsections (1)(a), (b) and (c) relate to ad valorem assessment and taxation of property, the "any other tax" referred to in subsection (1)(d) does not refer to an ad valorem tax. If defendants are correct, the inclusion of personal property in the assessed value of railroad property, which is really the imposition of a personal property tax, does not violate § 306(1)(d).

The court does not agree with defendants' interpretation of § 306(1)(d). The phrase "any other tax" obviously means a tax not referred to in subsections (1)(b) or (c) and for the reasons previously set out in this opinion the court holds that the additional tax paid by the railroad arising out of the inclusion of personal property in the total assessed value of railroad property is not a tax referred to in subsections (1)(b) or (1)(c). Because including personal property does not affect the assessment ratio referred to in subsection (1)(a), subsection (1)(b) is inapplicable. Because the same tax rate is applied to transportation property as applied to other "commercial and industrial property" (as that term is defined by § 306(3)(c)), subsection (1)(c) is inapplicable. The personal property tax imposed on railroads is therefore encompassed within the term "any other tax" and if its

imposition is discriminatory, it is unlawful and prohibited by § 306(1)(d).

[3] Section 306(1)(d) broadly prohibits the imposition of any tax which results in discriminatory treatment of railroads. It is therefore necessary to look at taxation of all classes of property to determine whether discrimination against railroad property exists.

The legislative history of § 306 is of some assistance in making this determination. The first legislative study of discriminatory property tax treatment of railroads, S. Rep. No. 445, 87th Cong., 1st Sess. (1961) (the Doyle Report), did not discuss personal property taxation. The report was concerned with real property tax discrimination among carriers and concluded, *id.* at 445-465, that because property taxes were levied on railroad and pipe line rights-of-way, those carriers were overtaxed when compared to motor, air and water carriers not subject to rights-of-way taxation.

By 1968, however, the drafters of what is now § 306 were primarily concerned with discriminatory property tax treatment of railroads compared to all other classes of property.

> As the opening witness for the railroads explained, subparagraph (c) of S. 927 [substantially similar to § 306] is not intended to abrogate the right of a State to establish separate rates for the different traditional classes of property. That is, the language of subparagraph (c) is not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of real property, tangible personal property, and intangible property, provided that carrier transportation real property is taxed at no higher rate than other real

> property; that carrier transportation personal property is taxed at no higher rate than other personal property; and, that carrier transportation intangibles are taxed at no higher rate than other intangible property.

S. Rep. No. 1483, 90th Cong., 2d Sess., at 10-11 (1968). The same report also states that the proposed legislation "is not intended to interfere or restrict State action in extending total or partial exemption to property of a class, such as churches, charitable institutions, homesteads, and the like." *Id.* at 11.

The intent of Congress in enacting § 306 was to protect interstate rail carriers from discriminatory property taxation. The most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class. The inclusion of personal property in the assessed value of railroad property and other centrally assessed businesses imposes a personal property tax on centrally assessed businesses that is not imposed on locally assessed businesses.

[4] The court therefore concludes that defendants have violated § 306(1)(d) by including personal property in the assessed value of plaintiffs' property. Such inclusion results in the imposition of a personal property tax on railroads that is not imposed on locally assessed businesses. The imposition of such a tax is discriminatory when railroad property is compared to all other property as a whole, excluding traditionally exempt property of churches, charitable institutions, homesteads and the like. The imposition of a personal property tax on other centrally assessed businesses does not render defendants' ac-

tions toward plaintiffs nondiscriminatory. As stated *supra,* the emphasis of Congress was on discrimination among all forms of property, not just among carriers or public utilities. Furthermore, discrimination against one business or person cannot be justified merely because others are also the victims of discrimination. Section 306 requires that if personal property of locally assessed businesses is to be exempt from ad valorem taxation the personal property of railroads must also be exempt.

ORDER

On the cross motions of the parties for summary judgment, IT IS ORDERED that judgment be entered declaring that Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 requires that plaintiffs' personal property including trade fixtures be excluded from defendants' 1979 valuation of plaintiffs' property for taxation purposes and that the remainder of plaintiffs' property be assessed at a ratio not to exceed 13.24 percent of true market value.

IT IS FURTHER ORDERED that the court will retain jurisdiction of the case and counsel for plaintiffs and defendants will confer and recommend to the court the proper distribution under the judgment of this court, and the method of distribution, of disputed tax monies deposited with this court pursuant to its order of February 21, 1980.